Supreme Court, U.S.
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No. 15-927

In the
Supreme Court of the United States

SCA Hygiene Products Aktiebolog
and SCA Personal Care Inc.,
Petitioners,
v.
First Quality Baby Products, LLC, First Quality Hygienic, Inc., First Quality Products, Inc., and First Quality Retail Services, LLC,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The question presented is as follows:

Whether, and to what extent, patent laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 4
ARGUMENT 5
I. THIS COURT'S *PETRELLA* HOLDING APPLIES TO PATENT CASES. 5
II. SOUND JUDICIAL POLICY COUNSELS AGAINST APPLYING LACHES TO PATENT DAMAGES 7
A. LACHES ENCOURAGES RUSHED FILINGS 7
B. LACHES DISCOURAGES SETTLEMENT 11
III. ADEQUATE PROTECTIONS WILL REMAIN FOR PARTIES SUED FOR PATENT INFRINGEMENT 12
CONCLUSION 15
APPENDIX – ABA RESOLUTION NO. 108B 1a

TABLE OF AUTHORITIES

CASES **PAGE**

A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,
960 F.2d 1020 (Fed. Cir. 1992).....11, 13

In re Epstein,
32 F.3d 1559 (Fed. Cir. 1994).....14

MCV, Inc. v. King–Seeley Thermos Co.,
870 F.2d 1568, 1571–72 (Fed. Cir. 1989).....9

Odetics, Inc. v. Storage Tech. Corp.,
185 F.3d 1259, 1273 (Fed. Cir. 1999).....8

Petrella v. Metro-Goldwyn-Mayer,
1354 S.Ct. 1962 (2014).....*in passim*

Romag Fasteners, Inc. v. Fossil, Inc.,
817 F.3d 782, 784 (Fed. Cir. 2016).....9

Rosemount, Inc. v. Beckman Instruments, Inc.,
727 F.2d 1540, 1550 (Fed. Cir. 1984).....9

Sara Lee Corp. v. Kayser–Roth Corp.,
81 F.3d 455, 461-62 (4th Cir. 1996).....8

SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 807 F.3d 1311, 1321 (Fed. Cir. 2015).....6, 13

United States v. Mack, 295 U.S. 480 (1935) 6

Wanlass v. General Elec. Co., 148 F.3d 1334, 1338 (Fed. Cir. 1998).....9

STATUTES

17 U.S.C. § 507(b).....6
35 U.S.C. § 102.....14
35 U.S.C. § 103.....14
35 U.S.C. § 282.....7
35 U.S.C. § 286.....2, 6

RULES

Fed. R. Civ. P 84.....9

OTHER AUTHORITIES

ABA, *House of Delegates – General Information*.....2

Brian T Yeh and Emily M. Lanza, Congressional Research Service Report, *Patent Litigation Reform Legislation in the 114th Congress* (July 19, 2015).....10

Brief of Electronic Frontier Foundation et al. as Amici Curiae in Support of Defendants-Appellees.....13

H.R. 9, The "Innovation Act".....11

Jennifer F. Miller, *Should Juries Hear Complex Patent Cases*, 2004 Duke Law & Technology Review 4.....7

Kate Tummarello, The Hill, *President calls for patent reform in SOTU* (Jan. 28, 2014).....11

Letters from Chief Justice John G. Roberts to Speaker John A. Boehner and Vice President Joseph R. Biden (April 29, 2015).....9

Manual of Patent Examining Procedure § 2256, Prior Art Patents and Printed Publications Reviewed by Examiner in Reexamination [R-07.2015].....14

Neil A. Smith, Complex Patent Suites: The Use of Special Masters for Claim Construction, 2 Landslide 1, Sept.-Oct. 2009.....7

Press Release of Senator Orrin Hatch,
Hatch Unveils Innovation
Agenda for the 114th Congress
(Oct. 22, 2014).....10

S. 1137, The "Protecting American
Talent and Entrepreneurship
Act (PATENT Act)".....10

The National Law Review,
Supreme Court Adopts
Amendments to Federal Rules
That May Deter Patent
Infringement Lawsuits,
Especially Those Filed by
Non-Practicing Entities.....10

STATEMENT OF INTEREST[1]

The American Bar Association (ABA) submits this brief in support of the petitioner and urges this Court to hold that the doctrine of laches cannot be applied to bar pre-suit legal damages in patent cases during the statutory six-year damages period, absent extraordinary circumstances under which injunctive relief or other prospective equitable relief is necessary

The ABA is the leading national organization of the legal profession, with more than 400,000 members from all 50 states, the District of Columbia and the U.S. territories. Membership is voluntary and is comprised of attorneys in private practice, government service, corporate law departments and public interest organizations. ABA members represent the full spectrum of public and private litigants, including judges, legislators, law professors,

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Further, *amicus curiae* certifies that Petitioners have provided blanket consent and Respondents have provided consent as well.

law students and non-lawyer "associates" in related fields.[2,3]

The ABA Section of Intellectual Property Law ("IPL Section"), which was established in 1894, is now the world's largest organization of intellectual property professionals. The IPL Section has approximately 20,000 members, including attorneys who represent patent owners, accused infringers, individual inventors, large and small corporations and universities and research institutions across a wide range of technologies and industries. The IPL Section works to promote the development and improvement of intellectual property law and takes an active role in addressing proposed legislation, administrative rule changes and international initiatives regarding intellectual property It also develops and presents resolutions to the ABA House

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] Only the recommendations adopted by a vote of the ABA's House of Delegates (but not their accompanying reports) become ABA policy. The House of Delegates is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. *See* ABA, *House of Delegates - General Information*, http://www.americanbar.org/groups/leadership/delegates.html (last visited May 14, 2016).

of Delegates for adoption as ABA policy to help foster necessary changes to intellectual property law.[4]

Through a collaborative process, the diverse members of the IPL Section have developed a consensus position on the question as to whether, and to what extent, patent laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period codified at 35 U.S.C. § 286. This position, articulated as follows, was adopted as ABA policy in February 2016:[5]

> [T]he American Bar Association supports interpretation and application of the statutory six-year patent damages period (35 U.S.C. § 286) as limiting availability of the judicially created laches defense as a bar to legal damages for patent infringement; and
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> ... supports interpretation and application of the statutory six-year patent damages period as not limiting availability of laches as a defense where equitable relief is sought.

The ABA's adoption of this policy was driven by certain core values of the legal system, specifically,

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[4] *See* http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/108b.html (last visited July 8, 2016).

[5] ABA Policy 108B, without its attendant Report, accompanies this brief as an appendix, and is available with its Report at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2016_hod_midyear_meeting_108B.docx.

deference to statutes enacted by Congress and policy rationale favoring non-litigation dispute resolution, where possible.

SUMMARY OF ARGUMENT

In *Petrella v. Metro-Goldwyn-Mayer*, 1354 S. Ct. 1962 (2014), the Court held that the doctrine of laches cannot bar a claim for damages brought within the three-year window for recovering relief established by the Copyright Act because the statute takes delay into account. The Court's holding in *Petrella* applies equally to patent cases, which include similar limitations on the recovery of relief based on a plaintiff's delay. Nothing in the Patent Act, its legislative history, or the common law compels a different conclusion. Moreover, sound judicial policy supports extending *Petrella* to patent cases. For years, in response to calls for patent litigation reform, Congress and the courts have been working to reduce the filing of unsubstantiated claims of patent infringement. Retaining laches to bar legal damages in patent cases, however, will continue to encourage rushed, premature filings, and discourage non-litigation resolutions such as settlement. Finally, retaining laches as a defense in extraordinary circumstances to curtail prospective equitable relief would provide adequate protection against prejudicial delay by parties, and equitable estoppel will protect those defendants who were misled by the promises or actions of a plaintiff.

In *Petrella*, the Court also correctly held that in egregious circumstances laches may limit injunctive relief. Accordingly, the ABA urges this Court to hold

that the doctrine of patent laches should not be applied to bar pre-suit legal damages in patent cases during the statutory six-year damages period, but should be available under extraordinary circumstances to prohibit resort to injunctive relief when appropriate.

ARGUMENT

I. THIS COURT'S *PETRELLA* HOLDING APPLIES TO PATENT CASES.

The ABA's position in this case is dictated by the Court's holding in *Petrella v. Metro-Goldwyn-Mayer*, 1354 S. Ct. 1962 (2014), that a laches defense is not available where a statute has a damage-limitations period that already accounts for delay. The Court's holding in *Petrella* applies equally to patent cases because the Patent Act also includes limitations on recovery based on a plaintiff's delay.

In *Petrella*, this Court examined whether the equitable defense of laches could bar damage relief on a copyright infringement claim brought within a three-year limitations period. The Court held that it could not: "[l]aches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window" of the Copyright Act. *Petrella*, 1354 S. Ct. at 1967. In so holding, the Court noted that the principal purpose of a laches defense is to supply relief from claims for which there was no applicable statute of limitations. Where Congress has provided a statutory limitations period, as in the Copyright Act, that limitations period indicates the

Congressional view as to unacceptable delay, making resort to the laches doctrine unnecessary.

The Copyright Act and the Patent Act contain similar limitations periods. The Copyright Act provides that "[n]o civil action shall be maintained unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). Similarly. the Patent Act mandates that "no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." 35 U.S.C. § 286. Although the Copyright Act's limitation could be labeled a statute of limitations and the Patent Act's limitation a damages-limitation period, as the Federal Circuit noted below any difference between the two labels "is irrelevant to the resolution of this case under *Petrella*." *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 807 F.3d 1311, 1321 (Fed. Cir. 2015).

Nothing in the Patent Act, its legislative history, or the case-law justifies deviating from the Court's reasoning in *Petrella*. The statute's text provides no language incorporating a laches defense, or even a suggestion of intent by Congress to establish a laches defense in patent cases. Nor is there unambiguous legislative history or a sufficiently developed common law to contradict that interpretation.

To the contrary. in at least one case predating enactment of 35 U.S.C. § 286, the Court held that "[l]aches within the term of the statute of limitations is no defense at law " *United States v. Mack*, 295 U.S.

480, 489 (1935). Presuming the statute intended to retain the substance of common law at the time it was enacted, *Mack* suggests that Congress did not enact Section 282 of the Patent Act with an intent to preserve a laches defense, and the inclusion of a six-year damages window in Section 286 only reinforces that conclusion. Expanding laches to bar claims brought within the limitations period would not only contradict previous decisions of this Court, it would preclude the uniformity sought by Congress. *Petrella*, 1354 S. Ct. at 1974-75.

II. SOUND JUDICIAL POLICY COUNSELS AGAINST APPLYING LACHES TO PATENT DAMAGES.

A. LACHES ENCOURAGES RUSHED FILINGS

Patent litigation is among the most complex and lengthy types of litigation faced by parties and courts,[6] often requiring the use of Special Masters for claim construction.[7] The laches defense acts as a bar to claims for damages occurring within the six-year limitations period and, thereby, serves as a strong incentive to patent holders to quickly file claims of infringement. Out of fear that they may lose rights if they do not act quickly enough, laches encourages patentees to file prematurely—before the allegations of infringement have crystalized, the investigation of

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[6] *See* Jennifer F Miller, *Should Juries Hear Complex Patent Cases*, 2004 Duke Law & Technology Review 4.

[7] *See* Neil A. Smith, *Complex Patent Suites: The Use of Special Masters for Claim Construction*, 2 Landslide 1, Sept.-Oct. 2009 http://www.americanbar.org/content/dam/aba/events/dispute_resolution/Smith_Complex_Patent_Suits.authcheckdam.pdf.

the facts is complete, and assessment of applicable defenses has been vetted fully. Retaining laches as a defense also requires patent owners to mount an expensive and likely lengthy federal lawsuit to stop seemingly innocuous infringements, even those that appear not yet to amount to a harm worthy of policing. This incentivizes litigation over other approaches, such as marketplace competition or industry partnerships such as those favored by research universities. It also may disproportionately impact those entities with large patent portfolios, such as manufacturers, for which it may be a struggle to actively police infringement.

The dilemma laches creates for intellectual property owners is far from fiction: plaintiffs risk either losing their right to recover, or sometimes choosing to rush to file before having all of the evidence or having completed negotiations, and risk litigating a weaker case and even the imposition of sanctions.[8] A patentee deemed to have slept on their rights by "failing to exercise timely its right to exclude in effect, *authorizes the public to infringe*—to 'make, use, offer to sell, or sell' a patented invention—during the laches period." *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1273 (Fed. Cir. 1999) (emphasis added). The period of delay triggering this rescission of patent rights is measured from the time that the patentee knew *or should have known* of the defendant's infringement, with the patentee having

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[8] The Fourth Circuit has described laches as applied in trademark cases as creating a filing conundrum, putting potential plaintiffs on the "horns of a dilemma." *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461-62 (4th Cir. 1996).

an affirmative duty to police the market for infringement. *Wanlass v. General Elec. Co.*, 148 F.3d 1334, 1338 (Fed. Cir. 1998).

As a result, courts have ruled that the laches doctrine barred recovery in cases involving delays of only three or four years, well short of the six-year statutory period. *Rosemount, Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 1550 (Fed. Cir. 1984); *MCV, Inc. v. King–Seeley Thermos Co.*, 870 F.2d 1568, 1571–72 (Fed. Cir. 1989). In a recent case, the U.S. Court of Appeals for the Federal Circuit upheld a laches defense to a patent infringement claim based on a period of delay of a mere five months. *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782, 784 (Fed. Cir. 2016).

The significant incentives that now exist for rational patent owners to rush to file to avoid a laches-based bar is in direct conflict with the efforts of the Court and of Congress to discourage patent owners from filing vague, premature, or overly aggressive complaints of patent infringement. Specifically, it contradicts efforts to curb "patent trolling"—the overly aggressive filing or threat of filing of unsubstantiated, frivolous claims of patent infringement. To deter premature filings of complaints in patent cases, on December 1, 2015, the Court abolished Rule 84 of the Federal Rules of Civil Procedure, putting an end to the use of Form 18's notice pleading and the filing of complaints that merely allude to patent infringement.[9]

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[9] The new rules were adopted on April 29, 2015. Letters from Chief Justice John G. Roberts to Speaker John A. Boehner and

Over the last several years, Congress has been working diligently to pass legislation to curb patent litigation abuses. Among the list of important provisions included within this legislation are those intended to discourage patent owners from filing premature and incomplete claims of infringement by requiring patent owners to provide within the original complaint or initial disclosures highly-detailed, fact-based allegations of infringement.[10] On October 22, 2014, Senator Orrin Hatch, the Chairman of the Senate Republican High-Tech Task Force, unveiled an innovation agenda for the 114th Congress that sought to discourage abusive patent litigation by, in part, requiring heightened pleading standards in all patent cases.[11] In his 2014 State of the Union

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Vice President Joseph R. Biden (April 29, 2015), *available at* http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf; The National Law Review, *Supreme Court Adopts Amendments to Federal Rules That May Deter Patent Infringement Lawsuits, Especially Those Filed by Non-Practicing Entities*, http://www.natlawreview.com/article/supreme-court-adopts-amendments-to-federal-rules-may-deter-patent-infringement#sthash.NU8URFvA.dpuf (Nov. 3, 2015).

[10] S. 1137, the "Protecting American Talent and Entrepreneurship Act (PATENT Act)" and H.R. 9, the "Innovation Act"; *see also* Brian T. Yeh and Emily M. Lanza, Congressional Research Service Report, *Patent Litigation Reform Legislation in the 114th Congress* (July 19, 2015) ("The Innovation Act and the PATENT Act would require parties alleging patent infringement in a civil action to include in the court pleadings specified details concerning each claim of each patent infringed, and the acts of the alleged infringer.").

[11] Press Release of Senator Orrin Hatch, *Hatch Unveils Innovation Agenda for the 114th Congress* (Oct. 22, 2014)

Address, President Obama called on Congress to help curb frivolous patent litigation.[12]

Discouraging patent owners from rushing to file complaints in federal court, or from suing over mere minor infringements, has been a priority for all three branches of Government. Maintaining a legal regime that encourages rush filing is in conflict with those efforts. To achieve uniformity, and avoid incentivizing "patent trolling" and premature patent infringement litigation, the Court should hold that patent laches may not be invoked to preclude a claim for damages brought within the Congressionally-prescribed time window.

B. LACHES DISCOURAGES SETTLEMENT

Retaining laches, despite the Congressionally-mandated six-year statutory limitations period, will also discourage pre-suit settlement negotiations. A patent owner's engagement in license negotiations will not necessarily excuse delay, particularly where those discussions start and stop, as they often do. *A.C. Aukerman Co. v. Miller Formless Co.*, 693 F.2d 697, 700 (7th Cir. 1982). Rather than encouraging

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http://www.hatch.senate.gov/public/index.cfm/releases?ID=64333cc6-14bc-469e-ade7-213b956eef71.

[12] On January 29, 2014, in his State of the Union Address to Congress, President Obama called on Congress to "pass a patent reform bill that allows our businesses to stay focused on innovation, not costly and needless litigation." Kate Tummarello, The Hill, *President calls for patent reform in SOTU* (Jan. 28, 2014). http://thehill.com/policy/technology/196754-obama-calls-for-patent-reform.

patent owners to take the time to work through complicated licensing negotiations and validity disputes out of court, retaining laches encourages patent plaintiffs to break off those discussions early and rush to court out of fear of an assertion of laches.

III. ADEQUATE PROTECTIONS WILL REMAIN FOR PARTIES SUED FOR PATENT INFRINGEMENT

Petrella's holding allows for laches to continue to bar, in egregious circumstances, claims for injunctive relief or other prospective equitable relief. *Petrella*, 1354 S. Ct. at 1977-78. Where the patent owner's delay is egregious, such that the unreasonable delay in bringing suit is necessary to protect a substantial business investment, the patent owner should not be entitled to injunctive relief.

Requesting that the Court remove laches as a defense to pre-suit damages, while also recommending that it prohibit recovery of injunctive relief in egregious circumstances, is not asking the Court to take inconsistent positions. Rather, it is simply advocating following *Petrella*, where the Court noted that allowing a suit for damages within the statutory window "will put at risk only a fraction of the income" the accused infringer has earned during the entire term. *Petrella*, 1354 S. Ct. at 1978. The absence of laches will work no unjust hardship on innocent third parties, such as consumers who have already purchased covered products. *Id.* Prohibiting injunctive relief in egregious cases seems a reasonable exception needed to protect an infringer's

substantial business investment undertaken based on an indisputable belief that the patent owner would not sue.

In the face of true misconduct by the patent owner, parties accused of patent infringement may avail themselves of the equitable estoppel defense. While equitable estoppel requires "affirmative conduct by the patentee inducing the belief that it abandoned its claims against the alleged infringer," laches requires no such misleading acts by the patent owner. *A.C. Aukerman Co.*, 960 F.2d at 1042. Instead, laches can be found based on the silence or inaction of the patent owner in the face of mere constructive knowledge of infringement. *Id.* at 1042–43. Therefore, equitable estoppel is the appropriate mechanism for policing true misconduct by the patent owner, and does not create the same incentives to rush to litigate that laches does. Moreover, where applicable, the equitable estoppel defense serves as a *complete bar* to a patent owner's claim of infringement when the patent owner engages in intentionally misleading conduct. *Id.* at 1043 (emphasis added).

Neither will the removal of laches as a defense to damages within the damages window affect defenses challenging the validity of a patent. Claims that it will do so have been grossly overstated.[13] Most patents are invalidated based on a showing that

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[13] Brief of Electronic Frontier Foundation et al. as Amici Curiae in Support of Defendants-Appellees at 6, *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 807 F.3d 1311, 1321 (Fed. Cir. 2015) (No. 2013-1564) (arguing that evidence may be needed to prove that a publication was publicly available).

someone other than the patent owner was the first to invent.[14] 35 U.S.C. §§ 102, 103. This is proven primarily based on earlier patents or other widely available publications describing the invention—prior art.[15] While at some point in our history published documents may have been hard to find, in this modern digital age, such evidence of prior invention will always remain accessible at the click of a mouse.[16] The internet provides digital permanence—what goes on the internet stays there. Digital archives, such as the Wayback Machine, capture and preserve nearly everything published on the internet.[17] The loss of the laches defense will

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[14] Consistent with the America Invents Act of 2011, the U.S. switched to a first-inventor-to-file system, effective March 16, 2013.

[15] While 35 U.S.C. § 102 defines prior art as inventions described in a patent, printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention, the vast majority of claims are rejected or invalidated based on earlier patents or other printed publications. *See e.g.*, Manual of Patent Examining Procedure § 2256, *Prior Art Patents and Printed Publications Reviewed by Examiner in Reexamination* [R-07.2015] ("Typically, the primary source of prior art will be the patents and printed publications cited in the request for ex parte reexamination.").

[16] Few if any patent applications that were filed during the period of the establishment of the original internet-based companies, often referred to as the "dot-com" era, around 1995 or so, remain viable at this point. Many have already been rendered unenforceable for failure to pay escalating USPTO patent maintenance fees, or have either expired or are about to expire. This is because, for patent applications filed after June 8, 1995, the patent term lasts 20 years from the filing date of the earliest application to which priority is claimed.

[17] *See In re Epstein*, 32 F.3d 1559 (Fed. Cir. 1994) (Database printouts of abstracts which were not themselves prior art publications were properly relied on as providing evidence that

likely have no real effect on future accused infringers' ability to mount an invalidity defense, because in the age of digital permanence, there is little risk that evidence necessary to an invalidity defense will be lost.

In *Petrella*, the Court rejected arguments that laches was needed to encourage plaintiffs to file earlier to preserve evidence useful to defending against liability and avoid prejudice to the defendant caused by lost documents or fading memories. It noted instead that the passage of time "is at least as likely to affect plaintiffs [who have the burden of proving infringement] as it is to disadvantage defendants." *Petrella*, 134 S. Ct at 1076-77. Concerns regarding the potential loss of evidence during the significantly shorter twenty-year patent term would appear to provide even less justification for preserving the laches defense than under the Copyright Act's much longer term of the life of the author plus 70 years.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that this Court should hold that the doctrine of patent laches cannot be applied to bar pre-suit legal damages in patent cases during the statutory six-year damages period, but is available under extraordinary circumstances to curtail claims for injunctive relief and other prospective equitable relief.

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the software products referenced therein were "first installed" or "released" more than one year prior to applicant's filing date).

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Appendix

APPENDIX – ABA RESOLUTION NO. 108B

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 8, 2016

RESOLVED, That the American Bar Association supports interpretation and application of the statutory six-year patent damages period (35 U.S.C. § 286) as limiting availability of the judicially created laches defense as a bar to legal damages for patent infringement; and

FURTHER RESOLVED, That the American Bar Association supports interpretation and application of the statutory six-year patent damages period as not limiting availability of laches as a defense where equitable relief is sought